IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1470

ALTON J. LEMON, ET AL., *Appellants,*

v.

DAVID H. KURTZMAN, ET AL., *Appellees.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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SUPPLEMENTAL BRIEF FOR COMMONWEALTH OF PENNSYLVANIA

ARGUMENT

Appellants, on October 31, 1972, have filed a Supplemental Brief which now calls the attention of the Court to the case of *Viss* v. *Pittenger,* — F. Supp. — (E.D., Pa., July 14, 1972, Civil Action No. 72-332).

The record in that case is not before this Court, and questions going to the merits of that case can scarcely be reviewed here.

Appellants seek to use the *Viss* case as a basis for their claim that, if this Court affirms the lower court's

decision that the payments to the schools be made, somehow that will give rise to forbidden entanglements. Secondly, Appellants say that the *Viss* case proves that the schools do not have genuine contracts with the Commonwealth.

The District Court opinion correctly notes that payments for 1970-1971, according to the statute, could be made only to schools having contracts, and that the Philadelphia Montgomery Christian Academy had no contract. The Commonwealth could not have entered into a contract with the Academy for the year in question because of our previous determination that the Academy had failed to meet other requirements of the Act. The substance of those requirements, and the merits of our determination, were never reached by the District Court in *Viss* and cannot be gone into by the Supreme Court in the instant case.

The Appellants, however, aver that the Commonwealth's basis for its original denial of qualification to the Academy was the Academy's alleged breach of the "secular function" requirements of the Act. Assuming, *arguendo,* that such was the basis, Appellants prove exactly what we have said: namely, that we had already made a determination that any given school did, or did not, meet such requirements, the result being (as we had stressed) that *"the state has long since discharged its function with respect to them", and no entanglement whatsoever can now result from the making of the payments.* Appellants point to nothing in the record of the instant case to show that the determinations in question were not made, and indeed the *Viss* case plainly shows that they were made.

Nor does the *Viss* decision aid Appellants in their assertion that no genuine contracts are herein involved. The District Court therein plainly considers that our contracts with the nonpublic schools, under Act 109, are real, legally binding contracts. It says that the very reason why the Academy could not get paid for that year is that they *"had no contract* for the school year 1970-1971".

Finally, the District Court, in *Viss,* strongly re-emphasizes why the payments, for 1970-1971, should now be made to all qualifying nonpublic schools:

> "We concluded that in order to prevent hardship and injustice to the nonpublic schools who in reliance on their contracts with the State had already performed the services and made the expenditures required by such contracts, the Supreme Court's decision would be given prospective application, thereby permitting reimbursement for the school year, 1970-1971."

CONCLUSION

The Appellants, by their Supplemental Brief, have raised an extraneous argument which, if of any value here, actually supports the position of the Commonwealth.

Respectfully submitted,

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